

No. 45443-2-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CITY OF VANCOUVER, Respondent

v.

BRINESH PRASAD, Petitioner.

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OPENING BRIEF OF RESPONDENT

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## **I. ISSUES PRESENTED FOR REVIEW**

- A. WAS THE DEPARTMENT OF LICENSING REPRESENTATIVE'S PRESENCE AT TRIAL SUFFICIENT TO SATISFY DEFENDANT'S RIGHT TO CONFRONTATION?

## **II. STATEMENT OF THE CASE**

### A. Procedural History:

The petitioner was found guilty at a non-jury trial by Judge John P. Hagensen on January 4, 2013, of one count driving while license suspended in the second degree. On July 23, 2013, the Honorable John F. Nichols filed an order dismissing the appeal and affirming the verdict on a Rules For Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) appeal. On September 4, 2013, the Honorable John F. Nichols filed a Ruling on Motion for Reconsideration further affirming the verdict on appeal.

The petitioner filed a Motion for Discretionary Review with this court on October 4, 2013. On December 18, 2013 the motion for Discretionary Review was denied in part and granted in part on one issue regarding confrontation.

B. Statement of Facts:

On March 24, 2012 Vancouver Police Department Detective David Brown was on patrol when he noticed a vehicle in front of him being driven by the defendant, Brinesh Prasad.(RP 19). Mr. Prasad's vehicle was stopped at a street light on 112<sup>th</sup> avenue at Burton/28<sup>th</sup>.(RP 19). Detective Brown ran the license plate on the vehicle to check for valid registration, check to see if it is stolen and check the driver's license status of the registered owner. (RP 19-20). The vehicle came back with the WA state driver's license number for the registered owner and it showed that the registered owner was suspended in the second degree. (RP at 20). Detective Brown later approached the vehicle and asked the driver if his name was Brinesh and he said it was which confirmed he was the registered owner. (RP at 23-24).

Once the light turned green, Mr. Prasad made a "U" turn to go south on 112<sup>th</sup>. (RP at 22). Mr. Prasad pulled into the gas station on the corner of 112<sup>th</sup> and Burton and Detective Brown followed and initiated a traffic stop. (RP at 23). After confirming the driver was Brinesh, the driver provided Detective Brown with his driver's license and the detective confirmed it was suspended. (RP at 24). Detective Brown confirmed that the photo on the driver's license matched the driver as Brinesh Prasad. (RP at 25-26). Mr. Prasad was issued a citation for Driving While License

Suspended in the Second Degree and was then released from the scene. (RP at 26). Detective Brown also confirmed that the person in court was the person who was driving the vehicle that day. (RP at 26). Detective Brown further confirmed that the person in court was the person who was driving and was also the person who was on the Washington State driver's license whose name was Brinesh Prasad. (RP at 27).

A custodian of records from the Department of Licensing testified at trial regarding the defendant's driver's status. (RP at 33-34). Mr. McQuade is a custodian of records for the Department of Licensing and he keeps and maintains records for the department. (RP at 34). City's Exhibit #1 was the order/notice of revocation from the Department of Licensing that is sent to the driver's last address of record. (RP at 34-35). The order/notice informs the driver the beginning and ending dates and the overall time period of when they are not eligible to drive. (RP at 34; Ex. 1). Defendant Brinesh Prasad's driving privilege was suspended in the State of Washington for 1 year beginning October 6, 2011. (RP at 59; Ex. 1). The defendant drove on March 24, 2012 which occurred during the 1 year suspension/revocation period. (RP at 59). As a custodian of records, Mr. McQuade reviewed the official driver's records for Brinesh Prasad that are kept on file at the Department of Licensing in Olympia. (RP at 60). The city's exhibits #1-3 are true and correct copies of the documents

that are on file in Olympia. (RP at 60). A review of those official records on file in Olympia showed that Mr. Prasad's driving status on March 24, 2012 was revoked. (RP at 60). A review of the defendant's official driving record showed that the order of revocation was in effect for refusal of the blood or breath test. (RP at 66; Ex. 3). This order was an administrative action taken by the Department of Licensing pursuant to RCW 46.20 the implied consent law. (RP at 66; Ex. 3). Brinesh Prasad was ineligible to reinstate his license on March 24, 2012. (RP at 66; Ex. 3).

### **III. ARGUMENT**

#### **A. THE PETITIONER IS PRECLUDED FROM RAISING CRAWFORD CONFRONTATION ISSUES FOR THE FIRST TIME ON APPEAL.**

As an initial matter, the City contends that the Petitioner should be precluded from raising this claim for the first time on appeal. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.' State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), *quoting* State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages



the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. Robinson at 305, McFarland at 333; State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources.” Robinson at 305.

In State v. O’Cain, 169 Wn.App. 228, 279 P.3d 926, Division One of this Court held that confrontation errors must be raised in the trial court in order to preserve the issue for appeal. In so holding, the Court of Appeals relied on the United States Supreme Court’s opinions in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009) and Bullcoming v. New Mexico, 131 S.Ct. 2705, 180 L.Ed. 2d 610 (2011). The O’Cain Court quoted extensively from *Melendez-Diaz* in concluding that the right to confrontation must be asserted at trial or else it is waived. The Court further observed that the decision whether to lodge a confrontation objection lies with the defendant or his counsel, not the trial court:

Requiring the defendant to assert the confrontation right at trial is also consistent with other Sixth Amendment jurisprudence. Indeed, were this not the defendant's burden, the trial judge would be placed in the position of sua sponte interposing confrontation objections on the defendant's

behalf—or risk knowingly presiding over a trial headed for apparent reversal on appeal. Such a state of affairs is obviously untenable. Trial judges should be loathe to interfere with the tactical decisions of trial counsel—the delegation of which lies at “the heart of the attorney-client relationship.” Taylor v. Illinois, 484 U.S. 400, 417, 108 S.Ct. 646 (1988). As our state Supreme Court has noted, it would be “ill-advised to have judges... disrupt trial strategy with a poorly timed interjection.” State v. Thomas, 128 Wn.2d 553, 560, 910 P.2d 475 (1996). Indeed, such interjections could impermissibly “intrude into the attorney-client relationship protected by the Sixth Amendment.” In re Personal Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835 (1994).

O’Cain at 243-44. The O’Cain Court distinguished State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007), noting that Kronich pre-dates the United States Supreme Court’s decisions in Melendez-Diaz and Bullcoming. O’Cain at 245-47. Relying on Melendez-Diaz, the O’Cain Court stated:

A lot of importance is included within that last quotation. Most important is the clear statement that “[t]he defendant always has the burden of raising his Confrontation Clause objection.” “Always” means always. It means every time. It means without exception. And it means always, every time, without exception, in the trial court. O’Cain at 239.

The O’Cain Court noted that the decision in Kronich rested on Sixth Amendment grounds. Thus, the United States Supreme Court’s subsequent holdings in Melendez-Diaz and Bullcoming necessarily overruled Kronich. O’Cain at 246-47 (“The sole authority advanced by

*O’Cain* in support of this proposition is a citation to the now-discredited *Kronich* decision.”) In a subsequent opinion in State v. Fraser, 170 Wn.app. 13, 26, 282 P.3d 152 (2012), Division One adhered to its decision in State v. O’Cain: “Under O’Cain, Fraser waived his confrontation clause argument about the cell phone records by failing to object, and we so hold.” Perhaps to cover all bases, Division One acknowledged that RAP 2.5 could arguably be viewed as a procedural rule governing the exercise of confrontation clause objections and performed a RAP 2.5 analysis, finding it had not been satisfied. Fraser at 26-27. However, the Court adhered to the central premise of O’Cain, which was that Kronich has been overruled by *Melendez-Diaz*. Fraser at 25-26.

Like the defendants in *O’Cain* and *Fraser*, Petitioner’s counsel lodged an objection to the evidence he now complains of on appeal, except counsel chose to lodge the objection on hearsay and authenticity grounds rather than confrontation grounds. Not once during the trial did the Petitioner object to the testimony of Mr. McQuade on 6<sup>th</sup> Amendment Confrontation Grounds. Not once during the numerous objections to the admission of the Department of Licensing documents (Exhibits 1-3) did the Petitioner state his objection was based on 6<sup>th</sup> Amendment Confrontation grounds. If it had been objected to or mentioned then the City could have remedied the error by redacting the diligent search portion

of Exhibit 2. However, the first time this issue was mentioned was a small paragraph in his RALJ brief that was brought before the court for the first time on Appeal only and therefore is barred from review. Had it been brought before the trial court as required, then it could have been remedied and there wouldn't have been all this unnecessary litigation. In addition, there has not been a showing of manifest error. It was within the courts discretion to allow the documents and the defendant chose to object on other grounds. As shown later, the error was harmless as the outcome would have been the same. Thus the City would ask that based on this, Discretionary Review is denied and the case remanded for further proceedings.

B. THERE WAS NO VIOLATION OF THE DEFENDANT'S CONFRONTATION RIGHTS AS THE DOCUMENTS WERE NON-TESTIMONIAL AND A REPRESENTATIVE OF THE DEPARTMENT OF LICENSING TESTIFIED AT TRIAL.

**1. The admitted exhibits were certified public records under seal and non-testimonial hearsay exceptions.**

The confrontation clause guarantees the accused the right to confront the witnesses against him. U.S. Const. amend. VI. As a general rule, admission of certified public records does not violate the Sixth Amendment right to confrontation. In addition, business and public

records are generally admissible absent confrontation...because-having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial-they are not testimonial. Melendez-Diaz v. Massachusetts, 557 U.S. 305 at 324, 129 S.Ct. 2527 (2009). Accordingly, public records that are kept in the regular course of business rather than prepared for the purposes of trial are not testimonial. State v. Benefiel, 131 Wn.App. 651, 656, 128 P.3d 1251 (2006) (prior judgment and sentence was not testimonial as it was not made to establish a fact in a criminal proceeding and declarant had no reasonable expectation that the State would rely on the record at trial), *review denied*, 158 Wn.2d 1009, 143 P.3d 829 (2006). Business and public records are generally admissible absent confrontation because, having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial. State v. Mares, 160 Wn.App. 558, 248 P.3d 140 (Ct App. Div 1 2011) *citing* Melendez-Diaz v. Massachusetts, 557 U.S. 305 at 324, 129 S.Ct. 2527 (2009). In addition, "RCW 5.44.040 provides for admissibility of certified copies of public records as an exception to the hearsay rule when the document is duly certified under seal." State v. Smith, 66 Wn. App. 825, 832 P.2d 1366 (1992); State v. Monson, 113 Wn.2d 833, 836-39, 784 P.2d 485 (1989). ER 902(d) also provides for self-authentication

of certified public records or documents. RCW 40.20.030 *Use as Original* allows for copies of originals to be deemed originals:

Such photo static copy, photograph, microphotograph or photographic film record, or copy of the original records shall be deemed to be an original record for all purposes, and shall be admissible in evidence in all courts or administrative agencies. A facsimile, exemplification or certified copy thereof shall, for all purposes recited herein, be deemed to be a transcript, exemplification or certified copy of the original. RCW 40.20.030.

Regarding domestic certified public documents under seal, such as a Certified Copy of Driving Record (hereinafter CCDR), ER 902(d) provides the document must comply with section (a), which requires that the document ‘bear [] a seal purporting to be that of...any state,...and a signature purporting to be an attestation or execution.’ State v. Smith, 66 Wn.App. 825 at 827. Washington courts have long recognized the inherent reliability and admissibility of driving records from DOL. State v. Monson, 113 Wn.2d 833, 784 P.2d 485 (1989). The notice of suspension and the abstract of driver’s record are public records under seal and business records and can be admitted at trial. State v. Jasper, 158 Wn.App. 518, 245 P.3d 228 (2010) *affirmed by* State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

In Jasper, the defendant was convicted of Hit and Run felony and Driving While License Suspended in the 3<sup>rd</sup> Degree. State v. Jasper, 158 Wn.App. 518, 245 P.3d 228 (2010) *affirmed by* State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012). The CCDR was admitted into evidence as a certified public document under seal and a business record. Id. In this case the court was more focused on the 6<sup>th</sup> Amendment right to confrontation issue but did note the following:

Here, two agency records (copies of letters sent to Jasper by the DOL) were admitted into evidence, each revealing that the DOL intended to suspend Jasper's license if he did not respond to two earlier citations issued to him. **These two records were admissible public records;** Jasper, 158 Wn.App. 518 at 531. (emphasis added) *Citing See, e.g., United States v. Orozco-Acosta*, 607 F.3d 1156, 1163-64, (9th Cir. 2010) (warrants of removal); United States v. Huete-Sandoval, 681 F. Supp. 2d 136, 139-40 (D.P.R. 2010) (border crossing records from the ATS (automated targeting system) database); Commonwealth v. Weeks, 77 Mass. App. Ct. 1, 927 N.E.2d 1023 (2010) (court docket sheets); Commonwealth v. Martinez-Guzman, 76 Mass. App. Ct. 167, 920 N.E.2d 322, 325 n.3 (records from registrar of motor vehicles detailing defendant's driving history), *review denied*, 456 Mass. 1104, 925 N.E.2d 547 (2010); Commonwealth v. McMullin, 76 Mass. App. Ct. 904, 904-05, 923 N.E.2d 1062 (2010) (court records and driving records); Fowler v. State, 929 N.E.2d 875, 880 (Ind. Ct. App. 2010) (booking information printout).

The court ultimately remanded the driving suspended count for a new trial for a confrontation clause violation; however it is also clear that

had the prosecution had a live person testifying, there wouldn't have been an issue with the CCDD evidence. Id.

Given this, it is well established that the CCDD has long been allowed into evidence at trial as an exception to the hearsay rule and a self-authenticating public record document. The CCDD evidence presented in this case was confirmed as certified and under the proper seal by the city's witness. (RP at 59-60). Exhibit# 2 contains the Seal of the Department of Licensing and the certification is for all documents and records attached. (Ex. 2). This came as a set packet of certified documents which is shown by the reference in the center:

PDL Attachments:

- Notice of PDL Revocation, October 6, 2011

Attachments:

- Abstract of Driving Record. (Ex. 2).

The certification and the seal together make this a certified public record under seal and a self-authenticating document. RCW 5.44.040; ER 902(d). There was no evidence to the contrary introduced at trial. There were no witnesses to testify that this was not the seal and not a certification by a custodian of records from the Department of Licensing. In fact not only did Mr. McQuade testify that this is the seal, he also stated during one of his many *voire dres* by defense, that he recognized Shannon Smiley as a person who is with the Department of Licensing. (RP 43-44;



RP at 46). It is clear from the front/cover sheet that the seal and the certification cover all three documents. In fact this was properly recognized by the court in this case. Here the court clearly reviewed all three exhibits:

The January 2<sup>nd</sup>, 2013 letter is certified under the seal of the Department of Licensing and it indicates that—that this—the information in this report—and the report includes the attachments—Notice of PDL revocation and abstract of driving record—and then there is a certification by Ms. Smiley that the records—which are referred to above—are official records maintained with the state. So this report is a report based on the official records of the state. It's properly under the seal so I would find that they are admissible. (RP at 50).

It was within the court's discretion to allow these exhibits into evidence at trial. In fact to make this decision more clear the court further responds to the defenses numerous questions:

RB: So you're holding that that is the proper seal—despite the statute—and that her declaration here establishes this to be a true and accurate copy of the original on file in Olympia?

Judge: Yes... (RP at 50).

Judge...As part of my ruling I found that the attachments were part of the report. And so the certification that that's the official record as contained in Olympia. (RP at 52).

As mentioned above as a result of cases like Jasper, recently the courts have required that a person come from the agency to testify in person regarding the driver's license status. This is to allow the defendant a right to confront the Department of Licensing. The current trial met this requirement by having Mr. McQuade, a custodian of records from the Department of Licensing, testify regarding the defendant's status on the date of the offense. Mr. McQuade confirmed that Exhibit #1 was the notice sent by the department to the defendant, that all exhibits were certified copies of the originals found in Olympia under seal and reflected his review of the defendant's driving record. (RP at 59-60). In addition, Mr. McQuade confirmed that Exhibit #1 is kept within the ordinary course of business of the department of licensing to notify drivers about their future suspensions and therefore this exhibit qualified as a business record. (RP at 35).

The abstract of complete driving record (hereinafter ADR) is the Department of Licensing's compilation of a driver's record. R.C.W. 46.52.130. It must contain:

- (a) An enumeration of motor vehicle accidents in which the person driving...
- (b) Any reported convictions, forfeitures of bail, or findings that an infraction was committed based upon a violation of any motor vehicle law;
- (c) The status of the person's driving privilege in this state; and
- (d) Any reports of failure to appear in response to a traffic citation or failure to respond to a notice of infraction served upon the named individual by an individual arresting officer.

It is kept in the ordinary course of the Department's business for requests that are made by numerous agencies. R.C.W. 46.52.130. In addition, the information placed on the ADR is considered accurate and correct and that all convictions followed proper department hearing procedure and protocol before administrative action was taken. WAC 308-104-130.

Here, Exhibit #3 was the ADR for the defendant. (RP at 62). It contains the driving history for the defendant including the reason for his suspension on the date in question. (Ex. 3; RP at 62). Department procedures for suspending a driver's license for a violation of the implied consent law (RCW 46.20.308) have stringent requirements to meet a person's right to due process. R.C.W. 46.20.308. As stated in the two statutes listed above, once a decision by the department is placed on the ADR it is considered accurate and correct. WAC 308-104-130. This is the

business of the Department of Licensing as a public office developed to monitor and control driver's licenses in the State of Washington. Therefore, Exhibit #3 is not hearsay within hearsay; it is a business record and a public record under seal. The contents of which were interpreted by Mr. McQuade for the fact finder's consideration along with Mr. McQuade's personal review of the defendant's driving record to confirm the defendant's driver's status on the date in question.

As stated earlier, it was within the court's discretion to allow these exhibits into evidence at trial.

**2. Mr. McQuade's independently reviewed the defendant's driving record which cured any possible confrontation errors.**

Although prepared for use at trial, a certificate of authenticity is not testimonial because it attests only to the existence of a particular public record and does not interpret the record nor certify its substance or effect. State v. Mares, 160 Wn.App. 558, 248 P.3d 140 (2011) In Mares, the State introduced a certified copy under seal of a Department of Licensing record of a victim without testimony. Id. The court allowed the document and found there was no confrontation violation. They reasoned that "The certification here attests only to the authenticity of a public record. It offers neither an interpretation of the record nor any assertions

about its relevance, substance, or effect.” *Id.* at 565. They held that the certification was non-testimonial and the trial court did not err in admitting it. *Mares*, 160 Wn.App. at 567.

Here Shannon Smiley’s certification is the same as that used in *Mares*. The diligent search portion of the record should have been redacted but the relevant and relied upon portion was that the other two documents (Exhibit 1 and Exhibit 3) were also certified public records under seal. Shannon Smiley’s added certification was non-testimonial and not subject to confrontation and therefore was proper and the court did not abuse discretion by allowing it at trial. Further as a non-testimonial certification it would not be subject to cross examination and there would be no requirement that a person who certifies a public record must testify at trial because the document is admissible without testimony.

The Petitioner’s reliance on *Lui* is misplaced. In *Lui*, an expert testified about his findings and opinion but did not do the initial testing. *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (2014). The court determined that there was no confrontation clause violation because:

...merely laying hands on evidence, DNA or otherwise, does not a “witness” make—something more is required. In *Melendez-Diaz*, an analyst became a witness by preparing a statement affirming that a substance was cocaine. *Id.* at 311, 129 S.Ct. 2527. In *Bullcoming*, an analyst became a

witness by giving live testimony that the defendant's blood alcohol level was 0.21. 131 S.Ct. at 2713. Our analysis here is no different: we are interested in experts who make statements to the court, not people who “la [y] hands on the evidence....” Melendez-Diaz, 557 U.S. at 311 n. 1, 129 S.Ct. 2527.50 Not everyone who makes some affirmation of fact to the tribunal will fall under the confrontation clause. Lui, 179 Wn.2d at 482.

This is similar to the current case and in line with what occurred at trial. Mr. McQuade’s testimony was akin to the expert in Lui, as he independently reviewed the records that are compiled in the ordinary course of business and then testified regarding the results of his review at trial. As in Lui, it would not be required or feasible to have every person who ever touched, reviewed or put information in the ADR of the defendant’s record testify at the trial. The records stand alone and are permitted without testimony. However the city has the right to put forth the testimony of a person who reviewed and prepared for trial to explain the record to the trier of fact.

The diligent search portion was admitted in error but the error was harmless. The outcome of the trial would have been the same. This is because Mr. McQuade testified that he had independently reviewed the driving record of the defendant Prasad. (RP at 59-60). His independent review was the same as the diligent search portion that should have been

redacted. Mr. McQuade testified as a custodian of records that his independent review showed that Brinesh Prasad was suspended on the date of driving and that he was ineligible to reinstate. (RP at 60). Mr. McQuade also confirmed that the records showed the reason for the suspension as a 1 year suspension for refusal of the breath test pursuant to 46.20.308. (RP at 66). Thus it is clear there was no confrontation violation for the certification made by Shannon Smiley or for the diligent search error.

As stated, the certification is non-testimonial and the purpose was to comply with the statute showing that the documents are certified public records under seal. Mr. McQuade confirmed this by testifying he knew Shannon Smiley worked at the Department of Licensing and that Exhibits 1 and 3 were true and correct copies of those on file at the Department of Licensing. (RP at 46; 60) Therefore it follows that the documents were properly admitted and that Mr. McQuade provided his own independent testimony to explain that these the records show that the defendant was suspended in the 2<sup>nd</sup> degree and ineligible to reinstate. Ultimately it is clear that there was no confrontation clause issue because Mr. McQuade provided live testimony subject to cross-examination.

#### IV. CONCLUSION

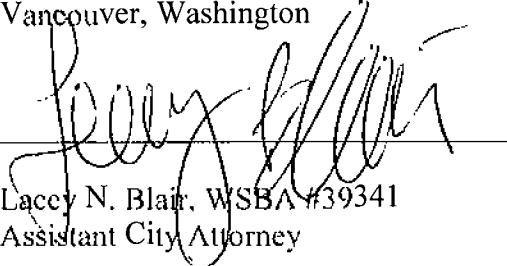
The defendant did not object to the evidence at trial for confrontation violations. If he had made the proper objection then the trial court could have remedied the errors then. Therefore he waived his right to assert this issue on appeal and thus the petition and appeal should be denied and remanded. Nonetheless, The DOL records admitted against the petitioner in this case were certified public records under seal and thus non-testimonial and met all the requirements for admission. The certification by Shannon Smiley was also non-testimonial and proper. Any error in Exhibit 2 was harmless and cured by the live testimony of Mr. McQuade from the Department who performed an independent review of the record and was subject to cross-examination.

For these reasons, it is respectfully requested that the petitioner's appeal be denied and the case remanded for further proceedings.

Respectfully submitted this 14<sup>th</sup> day of April, 2014.

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By:

  
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APPENDIX A

Report of Proceeding

1 counsel's Memorandum of Admissibility of Testimony  
2 Relating to Government Records.

3 RB: Your Honor, the - I just gave it to you and  
4 counsel in anticipation of an objection. I'm not  
5 bringing a motion based on it. So we're ready for the  
6 witness.

7 PG: The City calls Mike McQuade from the Department  
8 of Licensing Your Honor.

9 Judge: Okay. Please raise your right hand. Do you  
10 swear the testimony you're about to give is the truth,  
11 the whole truth and nothing but the truth?

12 MM: Yes.

13 Judge: Okay. Then please have a seat.

14 MM: Thank you.

15 **DIRECT EXAMINATION OF MICHAEL McQUADE**

16 Q: Mr. McQuade can you please state your full name  
17 and spell your last name for the record?

18 A: My name is Michael John McQuade. Last name is  
19 spelled M c Q U A D E. First name Michael. M I C H A E  
20 L.

21 Q: Thank you.

22 A: Um-hum.

23 Q: And where are you currently employed?

24 A: I work for the Department of Licensing in  
25 Olympia, Washington.

1 Q: And what is your position?

2 A: I'm a custodian of the record.

3 Q: Okay. My next question is part of your job

4 keeping and maintaining the Department of Licensing

5 records?

6 A: It is.

7 Q: Okay. I'm handing you what's been identified -

8 City's Exhibit 1 - would you take a look at that please?

9 A: Sure.

10 Q: Do you recognize that document?

11 A: I do.

12 Q: And what - what is that document?

13 A: It's a Notice of Revocation. We send these out

14 to the drivers as a notice of beginning and ending dates

15 of when they become not eligible to drive and when they

16 can become eligible again.

17 Q: And this Notice is sent out in the ordinary

18 course of business?

19 A: Yes. They're standard.

20 Q: The City moves to admit Exhibit 1 Your Honor.

21 RB: Objection. It's irrelevant. It's hearsay. It

22 violates RCW 5.44.040. I'll explain that. There's no

23 foundation. It's not under seal and it's not certified

24 and there's no testimony that he's ever seen it before.

25 Judge: I'm going to sustain the objection at this

1 point.

2 Q: As part of your job with the Department of  
3 Licensing, do you create those types of letters?

4 A: Yes. For every action that's created these  
5 letters go out to the driver's last address of record.

6 Q: And again that's done in the ordinary course of  
7 business?

8 A: Correct.

9 Q: And do you recognize that document - and I know I  
10 already asked that but -

11 A: Yeah. I do recognize it. It's the standard  
12 format for a Notice of Revocation with the driver's name  
13 in it here.

14 Q: I guess I don't understand defense counsel's  
15 objection at this point.

16 RB: You don't have to. It's already been sustained.

17 Q: City moves to admit.

18 RB: Objection. May I have Voir Dire?

19 Judge: Okay.

20 **VOIR DIRE OF WITNESS BY DEFENSE**

21 RB: Have you ever seen that document before - the one  
22 you have in your hand - have you ever seen it before?

23 A: The document?

24 RB: Yeah. The piece of paper in your hand. Have you  
25 ever seen it before?

1 A: Yes - many times. I see it every day.

2 RB: Oh really?

3 A: Not with this driver's name on it.

4 RB: That was my question.

5 A: Okay. You didn't specify that sir. Yes I've

6 seen this document - it's a standard document!

7 RB: I apologize for raising his voice.

8 A: No that's okay. I just - I didn't understand

9 your question.

10 RB: You - you surprised me with your answer.

11 A: I'll ask you next time if - if I don't understand

12 it, okay?

13 RB: You've never seen that piece of paper before?

14 A: Not with this driver's name on it, correct.

15 RB: Okay. And because you've never seen it before,

16 you've never compared it to the original on file with

17 the Department of Licensing, have you?

18 A: I did see it when I did my search of this driver

19 for - for preparing for this case.

20 RB: No. You said you've never seen it before and now

21 you say you have?

22 A: Well prior to preparing for this case I'd -

23 RB: That -

24 A: - seen -

25 RB: - that -

1 A: - this driver's -  
2 RB: - piece of paper -  
3 A: - pardon me?  
4 RB: - that piece of paper in your hand which I  
5 believe is marked as Plaintiff's Exhibit 1 - you've  
6 never seen that piece of paper before? Am I right?  
7 A: Rephrase that question for me please.  
8 RB: What -  
9 A: I don't understand your question.  
10 RB: - which part of it don't you understand?  
11 A: I - I saw it when I was preparing for this case.  
12 RB: You say "it". In - In -  
13 A: Yes I saw it in our files. I saw it in our  
14 records.  
15 RB: - oh and how did it get to court here then? Did  
16 you bring it with you?  
17 A: I imagine the - the prosecutor requested a copy  
18 of all this stuff.  
19 RB: You didn't bring that to court with you?  
20 A: No sir.  
21 RB: Do you know that's the same one or do you know if  
22 it was - perhaps - a faxed copy of one?  
23 A: I don't know that.  
24 RB: So you cannot tell us that this document - the  
25 piece of paper you have in your hand - was not generated

1 by e-mail or fax or somehow sent to the prosecutor?

2 A: Just by what it says at the bottom.

3 RB: Okay. And so you don't know independent of the

4 contents of the document how that came to be here in

5 court?

6 A: This single document I do not know.

7 RB: And I think you said you'd never seen one with

8 that name on it before, correct?

9 A: this particular name? I have not.

10 RB: Okay. So this document in your hand with this

11 name you have never seen before, right?

12 A: Until I prepared for this case, correct.

13 RB: When was the first time you ever saw the piece of

14 paper as opposed to maybe some other copy of it or -

15 A: This -

16 RB: - a computer screen -

17 A: - particular piece of paper that I'm holding?

18 RB: - yes.

19 A: I've never seen it until this - this morning,

20 correct.

21 RB: Okay. So now we're on the same track.

22 A: Okay.

23 RB: That's what I'm talking about.

24 A: Okay.

25 RB: The one with your fingerprints on it right now -

1       A:    Okay.

2       RB:   - you've never seen it before?

3       A:    Correct.

4       RB:   You - therefore, is it not true you've never

5       compared that document -

6       A:    Let me retract that.  May I?  Before I entered

7       the courtroom the prosecutor showed me this piece of

8       paper.

9       RB:   - okay.  Today?

10      A:    Today.

11      RB:   All right.

12      A:    Before I entered this courtroom - at this moment

13      -

14      RB:   You've never seen that document outside of court

15      -

16      A:    - this particular document I've never seen until

17      this prosecutor showed it to me this morning in that

18      little -

19      RB:   - okay.  Thank you -

20      A:    - vestibule.

21      RB:   - thank you for clarifying that.

22      A:    Okay.  Well I try.

23      RB:   And because you've never seen that document

24      before coming to court here you've never held that

25      document in your hand and compared it to any original



1 with the Department of Licensing?

2 A: Not this particular document. Correct.

3 RB: And there's no certification on that document is

4 there?

5 A: Well this says it's - it certifies -

6 RB: Oh yes. Somebody stamped certified on it, is

7 that what you're talking about?

8 A: No.

9 RB: What are you talking about?

10 A: Somebody doesn't manually do it. When it's

11 printed out it does it itself -

12 RB: Okay -

13 A: - through the program.

14 RB: - nobody has taken the trouble of certifying that

15 it's a true and accurate copy of the original on file in

16 Olympia and signed their name, correct?

17 A: This one piece?

18 RB: Yeah.

19 A: That's not how it's done. There are individual

20 pieces on -

21 RB: I'm asking about this document.

22 A: - no.

23 RB: There's no seal of the Department of Licensing on

24 that, is there?

25 A: Yes. There is.

1 RB: Read it to me.

2 A: "The State of the" - let's see - "The seal of the  
3 State of Washington".

4 RB: Okay. Where's the seal of the Department of  
5 Licensing of Washington?

6 A: It's not on this document.

7 RB: In fact that's the letterhead on the top isn't it  
8 - as opposed to a seal - an official seal of a  
9 government agent?

10 A: I don't know what you identify as official. To  
11 me it's an official seal.

12 RB: You don't know what the seal of the Department of  
13 Licensing is, do you?

14 A: Well I imagine when the document -

15 RB: I don't want your imagination sir!

16 A: - okay.

17 RB: Again I apologize.

18 A: No, that's fine.

19 RB: Has anybody ever told you or instructed you or  
20 showed you the statute that defines the seal of the  
21 Department of Licensing -

22 A: No sir.

23 RB: - I believe the last thing that happened was an  
24 offer of this document. Your Honor, it's hearsay. It's  
25 blatant hearsay. There is a hearsay exception for

1 government records.

2 I happen to have a memo on that. I don't want to  
3 snow the court with a bunch of paperwork but I have  
4 extensively researched every objection I've made here  
5 today. And to shortcut it to get a government document  
6 in as a copy of the official record on file in Olympia  
7 it has to be certified.

8 And certified means someone has to take the  
9 initiative to sign that it is a true and accurate copy  
10 of the original and they have compared it to the  
11 original on file in Olympia.

12 And there has to be a seal of the State of  
13 Washington that is RCW 5.44.040 which I've cited here.  
14 It is not admissible. Here's the statute Your Honor.

15 PG: Your Honor if it helps the court I can backtrack.  
16 I do have a document from the Department of Licensing  
17 that is the cover page of all of these documents which  
18 is under seal and does note that the revocation letter  
19 sent out is under seal and was certified and is compared  
20 also. I can backtrack and ask additional questions to  
21 establish that.

22 RB: I - I need a ruling on this document. We would  
23 have the same objections to anything else he's going to  
24 bring up.

25 Judge: Well at this point I'm going to sustain the

1 - the objection to its entry as evidence because of a  
2 lack of foundation.

3 **DIRECT EXAMINATION OF MICHAEL McQUADE - CONTINUED**

4 Q: Understood Your Honor. I'm going to hand you  
5 what's been marked for identification as City's Exhibit  
6 2.

7 RB: Well I - I would ask that all the exhibits be  
8 marked previously. Now are we marking new ones?

9 Q: A new one has been marked, yes.

10 RB: I object and if I have a grounds for it, I'll  
11 think of it.

12 Judge: Okay. Overruled.

13 Q: Would you take a look at that and tell me what  
14 that is please?

15 A: It's a certified copy of a driving record.

16 RB: Oh boy.

17 A: It's got the state seal on the corner here.

18 RB: Wait - wait. I'm sorry. Are we looking at the  
19 same document? You said this was a certified copy of  
20 driving record - is that how you characterize this  
21 document?

22 A: Yes.

23 Q: What does this document have attached to it -  
24 according to this document?

25 A: According to this? It has a personal driving

1 license status which indicates revoked. It says the  
2 following -  
3 RB: Move to strike! Move to strike if he's  
4 testifying about the contents of the document. It's not  
5 admitted. None of the contents are admissible. It's  
6 not admitted. Move to strike.  
7 Judge: Overruled. He can - he can testify as to  
8 what is on the document. However it's not substantive  
9 evidence until it's admitted into evidence.  
10 RB: Thank you.  
11 Q: Down - down at the bottom where it says  
12 attachments, what does it indicate?  
13 A: It says it's an abstract of a driving record.  
14 Q: And above that?  
15 A: That gives the attachments - about a notice of a  
16 personal driver's license revocation. The -  
17 Q: What is that?  
18 A: - that's this letter that you're showing me.  
19 Q: Okay. And is there a seal at the bottom of this  
20 document?  
21 A: There is.  
22 Q: And what does that seal say?  
23 A: It says: *"The State of Washington, Department of*  
24 *Licensing Seal"*.  
25 Q: Can you read that little blurb there for me?

1 A: The one above the signature?

2 Q: Yes please.

3 A: *"Having been appointed by the Director of*  
4 *the Department of Licensing as legal*  
5 *custodian of the driver record for the State*  
6 *of Washington, I certify under penalty of*  
7 *perjury that such records are on fiche or*  
8 *maintained within the Department of*  
9 *Licensing. And it's signed by Shannon*  
10 *Smiley, Custodian of Records, place*  
11 *Olympia, Washington - Date January 2<sup>nd</sup>,*  
12 *2013".*

13 Q: Your Honor, City move to admit both of these  
14 documents as business records.

15 RB: Objection. May I have Voir Dire?

16 Judge: Okay.

17 **VOIR DIRE OF WITNESS BY DEFENSE**

18 RB: Please look at Exhibit 2. Who is Shannon Smiley?

19 A: Question to me?

20 RB: Yes sir.

21 A: It says here she's the Custodian of Record.

22 RB: Okay. Do you know her?

23 A: No, I don't.

24 RB: But I thought you were the Custodian of Records  
25 for the Department of Licensing?

1       A:    I am.

2       RB:   How many Custodians of Records are there?

3       A:    I don't know.

4       RB:   You've never heard of her?

5       A:    Yeah, I know her name.  I don't know who she is.

6       RB:   You've seen her name?

7       A:    Um-hum.

8       RB:   Here on this document?

9       A:    I've seen it on other documents.

10      RB:   All right.  Now she's apparently attesting that

11      she is the Custodian of Records.  You say there's more

12      than one and that she says that the records of the

13      Department of Licensing are official, correct?

14      A:    That's what this says here  - they're legal.

15      RB:   No it says -

16      A:    She is the legal custodian -

17      RB:   - it says -

18      A:    - and they are official, correct.

19      RB:   - yeah.

20      A:    I'm sorry.

21      RB:   Official - thank you.  She's the legal custodian

22      of driving records and that such records are official,

23      right?

24      A:    Correct.

25      RB:   And they are maintained within the Department of

1     Licensing?

2     A:     Correct.

3     RB:    That's in Olympia?

4     A:     Correct.

5     RB:    So all the driver's license official records are

6     up in Olympia, correct - that's what this says?    Yes?

7     A:     Yes sir.

8     RB:    Does this anywhere say that this document is one

9     of those records?

10    A:     This particular document - I don't - I guess I

11    don't follow that.    Do you mean it asks -

12    RB:    I'm asking -

13    A:     - this one was included?    I - I - I don't

14    understand that question.

15    RB:    - well I think you just -

16    A:     It's stamped on here -

17    RB:    - [inaudible - both speaking] - No, no.    Okay.

18    You - you can read what she said there, right?

19    A:     - yes.

20    RB:    Of course you can.    You just did?

21    A:     Yeah.    Um-hum.

22    RB:    It doesn't say that this is part of those

23    official records kept up in Olympia, does it?

24    A:     No it does not say that verbatim, correct.

25    RB:    Right.    And this seal that you've testified as



1 the official seal of the Department of Licensing - again  
2 you've testified you don't know what the official seal  
3 looks like, do you?

4 A: Those weren't my words - but go ahead.

5 RB: Well what were your words?

6 A: I described this seal on this letter and you told  
7 me I was incorrect and then you came out with a - a RCW  
8 or whatever about the clarification for it. So I don't  
9 know what - I lost you there, I'm sorry.

10 RB: Okay. We'll start over again.

11 A: Okay.

12 RB: When you say "seal" are you talking about the  
13 letterhead -

14 A: No I'm talking about the one on the lower left  
15 corner there -

16 RB: - thank you.

17 A: - that's stam -

18 RB: Thank you.

19 A: - um-hum.

20 RB: Okay. This is a legal issue of course Your  
21 Honor. In the memorandum I gave you the statute says  
22 the seal has to be - and it's in quotation marks - and  
23 it says "shall" - it has to be in an exact, specific  
24 form and this isn't it. So that's one objection. Lack  
25 of foundation - proper seal under RCW 5.44.040.

1           The other objection is this is a [inaudible]. To  
2   be a certified copy of an official record there has to  
3   be a certification by somebody and it could be Shannon  
4   Smiley that this is a true and accurate copy of the  
5   original record on file in Olympia. She doesn't say  
6   that. She doesn't come anywhere near saying that.

7           What she says is I'm the Custodian of Records.  
8   Our records are official. They are in Olympia. As  
9   pointed out by the witness, it doesn't say anything  
10   about this being a true and accurate copy of the  
11   original on file in Olympia.

12           Nor does it say that Shannon Smiley compared this  
13   to the original in Olympia and found it to be a true and  
14   accurate copy. If all of that was included in the  
15   certification, then RCW 5.44.040 would be satisfied.

16           And it has to be satisfied in order to get past  
17   the hearsay objection. I object. I object to the  
18   admissibility not only of this document - which I think  
19   is number 2 - but it also follows through to number 1.

20   Judge:     Could I see a copy of that?

21   Q:     Of course Your Honor.

22   RB:    And Your Honor, there could be all sorts of neat  
23   looking letterhead on there. I could go print that on  
24   my own printer. The statute says it's got to be  
25   certified - duly certified - and under the proper seal.

1 It's neither.

2 But when - again - no witness has ever testified  
3 - nor does the certification indicate that this is a  
4 true and accurate copy of the original on file in  
5 Olympia.

6 Judge: Okay. I'm going to overrule the objection.  
7 The - the January 2<sup>nd</sup>, 2013 letter is certified under the  
8 seal of the Department of Licensing and it indicates  
9 that - that this - the information in this report - and  
10 the report includes attachments - Notice of PDL  
11 revocation and abstract of driving record - and then  
12 there's a certification by Ms. Smiley that the records -  
13 which are referred to above - are official records  
14 maintained with the state. So this report is a report  
15 based on the official records of the state. It's - it's  
16 properly under the seal and so I would find that they  
17 are admissible.

18 RB: So you're holding that that is the proper seal -  
19 despite the statute - and that her declaration here  
20 establishes this to be a true and accurate copy of the  
21 original on file in Olympia?

22 Judge: Yes.

23 RB: Your Honor I have another objection I'd like to  
24 Voir Dire the witness on.

25 Judge: And what's that? What's the objection?

1 RB: The objection is double hearsay under ER 805.  
2 Judge: Go ahead.  
3 RB: Actually no. It doesn't apply to this document.  
4 Judge: Okay.  
5 **DIRECT EXAMINATION OF MICHAEL McQUADE - CONTINUED**  
6 Q: Okay. Looking back to the Notice of Revocation.  
7 A: Um-hum.  
8 Q: Who does the Order of Revocation apply to?  
9 A: The name of the driver?  
10 Q: Please.  
11 A: Last name Prasad. First name Brinesh.  
12 Q: And what does it inform or what does it say that  
13 it informs Mr. Prasad of regarding his driving  
14 privileges?  
15 RB: Objection. It's not been admitted into evidence.  
16 He can't read the contents of it.  
17 Judge: Sustained.  
18 Q: I thought it did, but I move to admit these two  
19 documents into evidence Your Honor.  
20 RB: It did and the court overrun - or sustained the  
21 objection as to Number 1.  
22 Judge: At this point I sustained the objection  
23 because of lack of foundation. Foundation has been  
24 laid.  
25 RB: Your Honor are you talking about Number 1 now?

1 Judge: Yes.

2 RB: Number 2 is the one you just ruled that there was  
3 inadequate certification. There's no certification on  
4 that one.

5 Judge: No there is. It - as - as part of my ruling  
6 I found that the attachments were part of the report.  
7 And so the certification that that's the official record  
8 as contained in Olympia. So -

9 RB: All right. And before you stated that number 1  
10 is admissible I have an objection on double hearsay  
11 grounds.

12 Judge: - okay. Let's hear it.

13 RB: Here's the memo on double hearsay.

14 VOIR DIRE OF WITNESS BY DEFENSE

15 RB: And in terms of Voir Dire may I see number 1  
16 please sir?

17 A: I believe that's the one.

18 RB: Here on number 1 - this is a - it's admitted now  
19 as a document of the Department of Licensing. Okay?

20 A: Okay.

21 RB: And it's contained in your records in the  
22 Department of Licensing - at least perhaps the original  
23 is am I correct?

24 A: Okay. Yes.

25 RB: Contained in here is a statement - we're going to

1     revoke your driving privilege for being in physical  
2     control or Driving Under the Influence of alcohol - and  
3     it cites a statute. Do you see that?

4     A:     Um-hum.

5     RB:    How do -

6     A:     While Driving Under the Influence - ah-hah.

7     RB:    - yeah. How does the Department of Licensing  
8     when they generate this record know that he had been  
9     Driving Under the Influence of alcohol?

10    A:     I imagine there was an arrest report.

11    RB:    Okay. So a police report comes in from an  
12    outside agency, right?

13    A:     I - I - that's - I don't fol - I don't do that so  
14    I - I'm just hypothesizing this is the scenario.

15    RB:    Okay. But obv -

16    A:     I can't factually state that.

17    RB:    - obviously no one from the Department of  
18    Licensing had any personal knowledge about anybody in  
19    this courtroom driving while intoxicated other than  
20    records received from other agencies?

21    A:     Correct.

22    RB:    Okay. And we can assume that was probably a  
23    police report?

24    A:     Correct. Thank you.

25    RB:    RC - ER 805 Your Honor. Even when a document

1 such as a public record is admitted under a hearsay  
2 exception - the hearsay exception Your Honor as found is  
3 RCW 5.44.040 which allows the contents of official  
4 records - even when hearsay comes in - and it's all  
5 hearsay of course - every bit of the content - every  
6 separate portion of the content has to also meet a  
7 hearsay exception.

8 This is not - it is not a record of the  
9 Department of Licensing that the Defendant drove under  
10 the influence of alcohol. That's a record of some  
11 police agency that was sent to them. There's no hearsay  
12 exception for police reports.

13 Therefore this document - number 1 when it talks  
14 about Driving Under the Influence is relating double  
15 hearsay. ER 805 says: *"Double hearsay is inadmissible"*.  
16 It has to be excised from the exhibit.

17 Judge: Counsel your response?

18 Q: Yes Your Honor. I'm - I also have a certified  
19 copy of the driving record which I didn't mark initially  
20 as an exhibit either because I wasn't planning on  
21 admitting any of these documents. I didn't realize the  
22 objections that were going to come out.

23 RB: Your Honor, you asked for - you asked for a  
24 response to that objection.

25 Judge: Correct.

1 Q: Thank you. To the extent that it's in a police  
2 report the Department of Licensing has to rely on that.  
3 If they are unable to rely on such documents in  
4 determining whether or not someone is suspended or  
5 whether their license is revoked, I'm just not sure how  
6 the system would work.

7 I mean - the Vancouver Police Department in this  
8 case sent notice to the Department of Licensing. How  
9 that Notice is transmitted I don't believe - I don't  
10 know. But I don't believe that they just send a copy of  
11 the police report up. I'm sure that they put it in  
12 their data base in the - which then sends notice to the  
13 Department of Licensing that they're suspended.

14 In this case I think that that document is the  
15 driving record which shows that the Department of  
16 Licensing was -

17 RB: I object. Now he's reading you the contents of a  
18 document that's not been marked or offered into  
19 evidence?

20 Q: - at this point I'm not reading Your Honor. I'm  
21 saying that the document exists at the Department of  
22 Licensing has that puts them on notice from Vancouver  
23 Police - from the Vancouver Police Department that a  
24 person's license is suspended. And at that point they  
25 then generate this documentation. I believe that during



1 the police -

2 RB: If counsel is statements are intended to be  
3 evidence I move to strike.

4 Judge: Well the court isn't taking his statements  
5 as to be evidence so -

6 RB: Thank you.

7 Q: - so that being said I don't believe that they're  
8 relying on a police report when they make this statement  
9 that they were in physical control of the vehicle and  
10 Driving Under the Influence under RCW 46.23.3101.

11 RB: Well I guess he just said his - his witness is  
12 not credible. I think he's a credible man. Apparently  
13 the prosecutor says he's not. But -

14 Q: I haven't asked him questions -

15 RB: - but that doesn't address in any way the  
16 objection I made. In fact, it bolsters it.

17 He's talking about oh how things get up to the  
18 DOL and they come from here - they come from there - and  
19 they get to rely on them and all this - that has nothing  
20 to do with admissibility as substantive evidence under  
21 the hearsay rule and ER 805.

22 They're trying to prove that the man drove a  
23 motor vehicle while he was intoxicated. Okay. And  
24 they're trying to prove it because somebody in the  
25 police department must have sent a report up to DOL but

1 nobody knows for sure and so DOL put that in their - in  
2 their data base.

3 The fact that a document exists that would be  
4 inadmissible hearsay and yet it goes into a public  
5 record doesn't make it admissible. ER 805 says that.

6 Q: Your Honor the City is not trying to prove that  
7 he was Driving Under the Influence. The City is trying  
8 to prove that he was Driving While Suspended.

9 RB: Okay. Then they should agree to my Motion to  
10 Strike that provision. It's double hearsay.

11 Judge: Well I'm going to deny the motion. Proper  
12 foundation has been laid for this to come in as an  
13 exception under the hearsay rule and to - to find that  
14 every bit of information has to satisfy the hearsay rule  
15 is - is basically absurd.

16 For instance if - if a deed is admissible in - in  
17 a civil action it doesn't necessarily follow that the  
18 legal description could not be entered because a  
19 surveyor had come up with that and that would be - that  
20 would be hearsay.

21 So I think the - whether it's a business record  
22 or public records exception that it applies to the - the  
23 document itself and there's no - there would be no  
24 findings by the court that there was a conviction under  
25 a DUI. We're not - we're not dealing with that case at

1 this point. But it is a part of the official driving  
2 record that is on file in Olympia. So -

3 RB: Your Honor, there's - that document by - on its  
4 face doesn't say there's a conviction. Okay? So if I  
5 understand the court - you don't have to prove every  
6 little fact that goes into a public record, so the court  
7 is saying that the reason for the suspension need not be  
8 proven.

9 Judge: Correct.

10 RB: And because it need not be proven it's surplus  
11 age we're asking the court to strike that provision.  
12 Again it's double hearsay, but it need not be proven  
13 according to the court. We're asking that provision be  
14 stricken.

15 Judge: It's pa - it's part of the official record  
16 that has been admitted so it will not be stricken.

17 **DIRECT EXAMINATION OF MICHAEL McQUADE - CONTINUED**

18 Q: I'm going to backtrack a little. What does the  
19 Notice of Revocation say regarding Mr. Prasad's driving  
20 privilege?

21 RB: Objection. It speaks for itself.

22 Judge: Overruled. Go ahead. Answer.

23 A: It gives a revocation date when the driver will  
24 be revoked and for a period of time.

25 Q: What's that date?

1 A: It will - the revocation takes place on 10/6/2011  
2 at 12:01 a.m.

3 Q: And what's the period of time that it says it's  
4 revoked for?

5 A: It's for one year.

6 Q: And if the incident happened on 3/24/2012 would  
7 that fall within that one year revocation period?

8 A: Yes it would. It would be in that window.

9 Q: And does the bottom of the document note when and  
10 how the notice was delivered?

11 A: Yes. It was mailed by the U.S. Post Office and  
12 on the date it was and to the person at this address.

13 Q: And what does it say about the address?

14 A: It's mailed to the last record of address that we  
15 have on the - at the Department.

16 Q: And prior to this trial today, did you personally  
17 review Mr. Prasad's driving record?

18 A: I did.

19 Q: And as a result of that review, do you have  
20 personal knowledge regarding the status of his driving  
21 privileges on 3/24/2012?

22 A: Yes.

23 RB: I object. Evidence Rule 10.02. Best Evidence  
24 Rule. ER 602. He doesn't have personal knowledge. He  
25 only has knowledge of what he saw in records that he

1 looked at which he has not brought into court.

2 Q: Well he's the Record Custodian Your Honor.

3 Judge: It's - sus -

4 RB: He can't testify as to the contents -

5 Judge: - sustained on - on lack of foundation at

6 this point.

7 Q: Thank you. And as part of your job as a Records

8 Custodian, did you review the official record in

9 Olympia?

10 A: Yes.

11 Q: And as far as the documents you're holding in

12 front of you which have been admitted, do those appear

13 to be true and correct copies of the exhibits - or of

14 the documents that you reviewed in Olympia?

15 A: Yes they are.

16 Q: Okay. And what was - upon review of the record,

17 what was Mr. Prasad's driving status on the incident

18 date of 3/24/2012?

19 A: Revoked.

20 Q: And does that mean that there was an Order in

21 effect that revoked Mr. Prasad's driving privileges on

22 that date of 3/24/2012?

23 A: Yeah.

24 RB: I object. Move to strike. There's no Order

25 here.

1 Judge: Sustained. And we'll - we'll strike that  
2 last response from the record.

3 Q: On what basis would the Department of Licensing  
4 suspend someone's license for one year?

5 A: The basis is refusing a breathalyzer is a  
6 mandatory one year revocation.

7 Q: Okay.

8 RB: Well may I object and Voir Dire briefly Your  
9 Honor?

10 Judge: You may.

11 **VOIR DIRE OF WITNESS BY DEFENSE**

12 RB: Where in - where in the two exhibits you have  
13 does it say anything about refusing a breathalyzer?

14 A: It doesn't.

15 RB: Okay. So you're referring to some other  
16 document?

17 A: In my diligent search of the record I - I  
18 discovered that, correct.

19 RB: Okay. So now you're testifying as to a document  
20 you didn't bring to court then, right?

21 A: I didn't bring any documents to court sir.

22 RB: Move to strike. ER 10.02. Best Evidence rule.  
23 He can't come in and testify that he saw a piece of  
24 paper or document or a computer screen at a different  
25 location which he didn't bring to court and that he

1 hasn't compared with the original. So that's *U.S.*  
2 *versus Bennett*, I think it's 376 F.3d. It's in the memo  
3 I gave to the court on Best Evidence Rule.

4 Q: I'm assuming you're sustaining that objection  
5 Your Honor, I'm moving on.

6 **DIRECT EXAMINATION OF MICHAEL McQUADE - CONTINUED**

7 Q: I'm handing you what's been marked for  
8 identification as City's Exhibit 3. Can you please take  
9 a look at that. Do you recognize that document?

10 A: Yes. it's a abstract of the complete driving  
11 record.

12 Q: Is that what's referred to on Exhibit 2 actually  
13 - the certified copy at the bottom of that document?

14 A: Yes. An abstract of the driving record, correct.

15 Q: All right. City moves to admit that document as  
16 well as part of the business record Your Honor.

17 RB: Well objection. I think I just heard him say  
18 business record. There's been no foundation laid under  
19 the Business Records Act. We've been talking about the  
20 Public Records Act which is a totally different statute  
21 and - and there's no foundation under the Business  
22 Records Act.

23 Another thing about the Business Records Act  
24 which is actually the statute - I think it's in 5.45 - I  
25 think 0 - 10 - maybe 020. It provides that the - it

1 provides that the record has to be one regularly kept in  
2 the course of the business and the interpretation of  
3 that is it can't be based on information from outside  
4 sources. That's the case law dealing with the Business  
5 Record Act.

6 This - clearly - just like the other documents is  
7 based on hearsay - double hearsay from outside sources.

8 Judge: Well on - on other grounds it is admissible.  
9 So I'll overrule the objection.

10 RB: And - and Your Honor - and I'm not here trying to  
11 be dilatory or argumentative. I - I've pre - prepared a  
12 defense for this man based on my understanding and my  
13 reading of the Rules of Evidence.

14 The court's overruled my objection - I fully  
15 appreciate that. But I would like to Voir Dire about  
16 the content of this document because I'll be moving to  
17 strike portions of the content.

18 Q: Your Honor, similar to the other documents if the  
19 document is admitted I'm not sure how he could strike -

20 RB: I can demonstrate blatant inaccuracies in this  
21 document.

22 Judge: Okay. First of all, the - the document and  
23 - and what's the number of that document?

24 Q: It's number 3 Your Honor.

25 Judge: Okay. The document is ad - Plaintiff's



1 Exhibit Number 3 is admitted. And then you can go ahead  
2 and - well -

3 RB: Well if I'm going to Voir Dire it should be  
4 before you admit it. So -

5 Judge: Well - yeah - that's - that's going to be  
6 basically a cross examination question. So - we'll - so  
7 you can proceed.

8 RB: Well it goes to the admissibility - so - my  
9 questions would deal with admissibility.

10 Judge: Yeah - I mean it - it - we've already dealt  
11 with the admissibility so -

12 Q: So this document - you've had a chance to review  
13 it?

14 A: Yes.

15 Q: And have you had a chance to review it prior to  
16 coming to trial today?

17 A: I did.

18 Q: What does it say - roughly in the middle of the  
19 document - what - does the document speak to refusal of  
20 a breath test?

21 A: Yes. The driver record history indicates that.

22 Q: And what does it say?

23 A: It - the refusal for the blood breath test was on  
24 - the action date was on October 6<sup>th</sup>, 2011 and the action  
25 taken was revo - and the -

1 Q: Does it say - oh excuse me. Please continue.

2 A: - well the eligibility date was 10/6/2012.

3 Q: Does it say anything regarding a court finding in  
4 there?

5 A: Conviction you mean? Yeah. It - it gives an  
6 indication here of a probationary license status based  
7 on a court conviction.

8 Q: After it says refused breath test, what does it  
9 say there?

10 A: Probationary license status - set based on the  
11 court conviction or no action certified. Deferred  
12 prosecution for DUI or Physical Control.

13 Q: On the line that starts 8/6/2011 - do you see  
14 that in the middle of the document?

15 A: Oh at the top there under tickets?

16 Q: Correct. What does it say after refused breath  
17 test?

18 A: Driving Under the Influence and refused breath  
19 blood test.

20 Q: To the right of refused breath blood test?

21 A: Oh! Conviction 10/6/2011. I'm sorry.

22 Q: Thank you.

23 A: I'm not listening.

24 Q: And in reviewing Mr. Prasad's driving record were  
25 you able to determine - we just covered this - but why

1 the Order of Revocation was in effect?

2 A: Yes.

3 Q: And why is that?

4 A: For refusing -

5 RB: Objection. ER 10.02.

6 Judge: Overruled. You can answer the question.

7 A: - for the refusal of the blood breath test.

8 Q: And was the action taken by the Department of

9 Licensing - was that an administrative action?

10 A: Yes. It was.

11 Q: Was that pursuant to an RCW?

12 A: Yes it was.

13 Q: Was it pursuant to RCW 46.20?

14 A: Yes it was.

15 Q: Is that the Implied Consent Law?

16 A: Yes.

17 Q: Finally, was the Defendant eligible to reinstate

18 his license on the incident date of 3/24/2012?

19 A: No.

20 Q: Thank you.

21 A: Um-hum.

22 Judge: Okay. Mr. Bennett?

23 **CROSS EXAMINATION OF MICHAEL McQUADE**

24 Q: Mr. McQuade do you remember talking to -

25 A: Yes sir.

1 Q: - do you remember talking to me on December 26<sup>th</sup>,  
2 2012 - on the phone?

3 A: Your name - I didn't get.

4 Q: Oh I'm sorry. I'm Roger Bennett.

5 A: Yes I do.

6 Q: And you told me you'd been with DOL for twenty-  
7 one years, you used to be a Hearings Officer and now  
8 you're in-house, correct?

9 A: Not a Hearings Officer but I've been there  
10 twenty-one years.

11 Q: Oh I -

12 A: I was a driver license examiner.

13 Q: - oh. I'm sorry.

14 A: That's okay.

15 Q: I put that down wrong.

16 A: That's all right.

17 Q: The way -

18 A: I wish I was a Hearings Examiner.

19 Q: - we have a good conversation didn't we?

20 A: Yeah. Um-hum.

21 Q: Very polite - at some point it was a little unpl  
22 - unpleasant when you found out I wasn't the prosecutor,  
23 isn't that right?

24 A: Yeah. I was giving it some information contrary  
25 to that, yes.

## APPENDIX B

### Exhibits 1-3



STATE OF WASHINGTON  
DEPARTMENT OF LICENSING  
P. O. Box 9030 • Olympia, Washington 98507-9030

January 2, 2013

sls

The information in this report pertains to the driving record of:

Lic. #: PRASAB\*363QK  
Name: PRASAD, BRINESH  
9492 SW MAPLEWOOD DR APT D39  
TIGARD OR 97223

Birthdate: November 12, 1964  
Eyes: BRN Sex: M  
Hgt: 6 ft 00 in Wgt: 180 lbs  
License Issued: December 30, 2010  
License Expires: November 12, 2015

After a diligent search, our official record indicates that the status on March 24, 2012, was:

**Personal Driver License Status:**

**Commercial Driver License Status:**

- Revoked

**The following also applied:**

- Subject was not eligible to reinstate on the date of arrest.

**PDL Attachments:**

**CDL Attachments:**

- Notice of PDL Revocation, October 6, 2011

**Attachments:**

- Abstract of Driving Record



Having been appointed by the Director of the Department of Licensing as legal custodian of driving records of the State of Washington I certify under penalty of perjury that such records are official, and are maintained within the Department of Licensing.

*Shannon Smiley*

Custodian of Records  
Place: Olympia, Washington  
Date: January 02, 2013



STATE OF WASHINGTON  
DEPARTMENT OF LICENSING  
PO Box 9030 • Olympia, Washington 98507-9030

09/06/2011

**Notice of Revocation**

**CERTIFIED**

3CRA  
PRASAD, BRINESH  
9492 SW MAPLEWOOD DR APT D39  
TIGARD OR 97223-0000

Lic. # PRASAB\*363QK

On 10/06/2011 at 12:01 a.m. we will revoke your driving privilege for 1 year for being in physical control or driving under the influence of alcohol or any drug. RCW 46.20.3101.

**What do I have to do?**

Any Washington driver license or permit, including occupational (ORL) or ignition interlock licenses (IIL), will not be valid and must be returned to Department of Licensing, PO Box 9030, Olympia, WA 98507-9030.

**How do I get my license back?**

If nothing else on your driving record prevents it, you will be eligible to get a license on 10/06/2012. To get one you must do all of the following:

- File proof of financial responsibility until 10/06/2015. An SR-22 is the most common method. RCW 46.29.450
- Pass all required tests, pay a reissue fee, and any other required licensing fees.

**What other options are available?**

You may be able to get an ORL, IIL, or other temporary restricted license during this revocation. You can also contest this action by submitting a Driver's Hearing Request form or written request along with \$200 (unless you provide proof of indigence), postmarked within 20 days from the date of your arrest. Failure to submit a complete and timely request will be considered a waiver of your right to a hearing. You'll find all the necessary forms on our website.

We suggest that you always check the status of your driving privilege before you drive. Find out more at [www.dol.wa.gov](http://www.dol.wa.gov) or by calling Customer Service at 360-902-3900.

Driver Records

*The Department of Licensing certifies that this document was mailed via U.S. post office on 09/06/2011 to the person named herein at the address shown, which is the last address of record with the Department.*

*We are committed to providing equal access to our services.  
If you need accommodation, please call 360-902-3900 or TTY 360-664-0116.*

**CERTIFIED****Driving Record****Abstract of Complete Driving Record**

This information was obtained through the IDIPS Help Desk application and is current as of 1/2/2013 2:22:47 PM

**Driver Information**

PIC PRASA-B\*-363QK  
Name Prasad, Brinesh  
DOB 11/12/1964  
Gender Male

**Driver License Status**

Status Revoked  
DWLS/R 2nd Degree  
Issued 12/30/2010  
Expires 11/12/2015  
Original issue date 10/16/1996

**Reinstatement**

**Requirements**  
Retest - written and drive  
Financial responsibility (SR-22) until  
12/13/2016  
Alcohol report

**Fees**  
\$150 Reissue  
\$50 Probationary

Additional requirements may apply

Additional licensing/testing fees may apply

**Tickets**

Violation date	Violation #	Description	Conviction	name	Court type	BAC	Licensing state	Exempt veh	Veh type
8/6/2011		Refused the breath/blood test	Conviction 10/6/2011	Wa Dmv	Federal				
8/6/2011	1Z0480182	Registration violation, no tabs	Conviction 9/26/2012	Clark Co	District				
8/6/2011	1Z0480181	Driving under the influence and refused breath/blood test	Conviction 9/4/2012	Clark Co	District				
7/10/2009	N130664	Speeding (37 mph in a 25 mph zone)	Conviction 8/12/2009	Clark Co					

**Drive Record History**

Action date	Reason	Action taken	Eligibility date	Release date	Violation date	Violation #	DUI/BAC detail	Licensing state
10/25/2012	Ignition interlock required for 1 year	No Action	12/13/2013	12/13/2014		1Z0480181		
10/6/2011	Refused the breath/blood test	Revoked	10/6/2012	10/6/2015	8/6/2011		.00 .01	
12/13/2012	Probationary license status set based on court conviction or deferred prosecution for dui or physical control	No Action	12/13/2013	12/13/2018	8/6/2011			
12/13/2012	Driving under the influence, driver credited for time served on admin side	Revoked	12/13/2013	12/13/2016	8/6/2011	1Z0480181	.00 .00	
11/14/2011	Failure to make required payment of fine and costs	Suspended	11/14/2011	9/23/2021		1Z0480182		OR
9/7/2012	Failure to make required payment of fine and costs	Released						



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

CITY OF VANCOUVER,  
Respondent,

v.

BRINESH PRASAD,  
Petitioner.

No. 45443-2-II

AFFIDAVIT OF MAILING

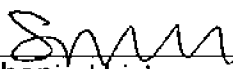
STATE OF WASHINGTON )  
COUNTY OF CLARK )

On April 14, 2014, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the Opening Brief of Respondent.

TO:

Roger A. Bennett  
Attorney at Law  
112 W 11<sup>th</sup> Street, Suite 200  
Vancouver, WA 98660

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

  
Stephenie Urick

Date: 4/14/14, 2014.

Place: Vancouver, Washington.

AFFIDAVIT OF MAILING

## VCA

**April 14, 2014 - 4:28 PM**

### Transmittal Letter

Document Uploaded: 454432-Appellant's Brief.pdf

Case Name: City of Vancouver v Brinesh Prasad

Court of Appeals Case Number: 45443-2

**Is this a Personal Restraint Petition?** Yes ☐ No

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Earl, Stephenie M - Email: [stephenie.urick@cityofvancouver.us](mailto:stephenie.urick@cityofvancouver.us)

A copy of this document has been emailed to the following addresses:

[lacey.blair@cityofvancouver.us](mailto:lacey.blair@cityofvancouver.us)

[rbenn21874@aol.com](mailto:rbenn21874@aol.com)